UR LEISURE RESORTS SDN BHD v. MALAYAN BANKING BHD

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
AZIAH ALI JCA
LIM YEE LAN JCA
[CIVIL APPEAL NO: P-02-2233-09-2012]
4 FEBRUARY 2015

LAND LAW: *Sale of land – Order of court – Land charged to bank as security for loan – Default in repayment of loan – Bank applied for sale of land to Land Administrator – Land Administrator did not make any order for sale of land but referred application to High Court under s. 265(3A) of National Land Code – High Court made order for sale – Whether Land Administrator had power to refer application for sale made under s. 260 of National Land Code to High Court pursuant to s. 265(3A) – Whether order for sale of land made twice previously at Land Office pursuant to s. 265(1), (2) and (3) of National Land Code – Whether sub-s. (3A) of s. 265 of National Land Code must be read independently of sub-ss. (2) and (3)*

The appellant was the registered proprietor of a piece of land ('the land') which was charged to the respondent as security for a loan taken by a third party. When the third party defaulted on the repayment of the loan, the respondent proceeded to apply to the Land Administrator for the sale of the land pursuant to s. 260 of the National Land Code ('NLC'). Even though an inquiry was held on various dates, the Land Administrator did not make any order for sale of the land but instead referred the application to the High Court under s. 265(3A) of the NLC as the appellant/chargor had disagreed with the reserved price proposed by the respondent/chargee and had applied the matter to be referred to the High Court. Purporting to act under s. 265(3A), the High Court made an order for sale based on the view that sub-s. (3A) of s. 265 must be read independently of sub-ss. (2) and (3); and that this must be the intention of Parliament when it amended s. 265 *via* the National Land Code (Amendment) Act 2001 by deleting sub-s. (3)(c) of that section and introducing (3A). Dissatisfied, the appellant appealed against the decision of the High Court. The primary issue that arose for the court's consideration was whether a Land Administrator has the power pursuant to s. 265(3A) of the NLC to refer an application for sale, made to him pursuant to s. 260 of the NLC, to the High Court, without previously having carried out a sale of the land at the land office twice pursuant to sub-ss. (1), (2) and (3) of s. 265 of the NLC.

Held (allowing appeal with costs)
Per Mohd Hishamudin Yunus JCA delivering the judgment of the court:

(1) If sub-s. (3A) were to be read independently of sub-ss. (2) and (3), as ruled by the High Court, how would one explain the meaning of the words 'refer the matter to the court' in the present sub-s. (3). Those

words will only make sense if they were read together with sub-s. (3A). With the introduction of sub-s. (3A), the position does not change as there still must have been two prior unsuccessful sales by the Land Administrator before he can lawfully refer the matter to the High Court. What the amendment now makes clear, *via* a proviso to sub-s. (3A), was that the High Court cannot, in exercising its power under sub-s. (3A), in dealing with the reference, make an order to direct the Land Administrator to carry out a sale. Under the pre-amended provision of sub-s. (3), it was not made clear as to whether the High Court, in dealing with the reference, had the power to make an order directing the Land Administrator to carry out the sale. (paras 9 & 14)

(2) Clause 30 of the Explanatory Statement to the Bill was of no assistance to the construction of either the amended sub-s. (3) or the new sub-s. (3A). It does not contain a full and clear explanation as to the purpose of the amendments to s. 265. The clause was a mere lip service effort to explain the purposes of the amendments; of little utility; and significantly, cl. 30 had omitted to even mention, *inter alia*, the proviso to sub-s. (3A). (para 15)

(3) The order of the High Court and the decision of the Land Administrator to refer the matter to the High Court were set aside. The matter was ordered to be sent back to the Land Administrator to carry out a proper inquiry in accordance with the provisions of s. 261 of the NLC and to make the appropriate decision under s. 263 of the same. (para 13)

Bahasa Malaysia *Translation Of Headnotes*

Perayu merupakan pemilik berdaftar sebidang tanah ('tanah tersebut') yang dipajakkan kepada responden sebagai cagaran bagi pinjaman yang dibuat oleh pihak ketiga. Apabila pihak ketiga mungkir dalam pembayaran semula pinjaman tersebut, responden terus memohon kepada Pentadbir Tanah bagi jualan tanah di bawah s. 260 Kanun Tanah Negara ('KTN'). Walaupun inkuiri tanah dibuat pada pelbagai tarikh, Pentadbir Tanah tidak mengeluarkan perintah jualan tanah tetapi sebaliknya merujuk permohonan tersebut kepada Mahkamah Tinggi di bawah s. 265(3A) KTN kerana perayu/pemajak tidak bersetuju dengan harga rizab yang dicadangkan oleh responden/pemegang pajakan dan telah memohon agar hal perkara tersebut dirujuk kepada Mahkamah Tinggi. Bertindak di bawah s. 265(3A), Mahkamah Tinggi mengeluarkan perintah jualan berdasarkan pandangan bahawa sub-s. (3A) di bawah s. 265 mesti dibaca secara berasingan daripada sub-ss. (2) dan (3); dan ini pastinya niat Parlimen semasa meminda s. 265 melalui Kanun Tanah Negara (Pindaan) Akta 2001 dengan memotong sub-s. (3)(c) seksyen tersebut dan memasukkan (3A). Tidak berpuas hati, perayu merayu terhadap keputusan Mahkamah Tinggi. Isu utama yang berbangkit bagi pertimbangan mahkamah adalah sama ada Pentadbir Tanah mempunyai kuasa di bawah s. 265(3A) KTN untuk merujuk satu permohonan bagi

jualan, yang dibuat kepada beliau di bawah s. 260 KTN, kepada Mahkamah Tinggi, tanpa terlebih dahulu mengeluarkan perintah jualan ke atas tanah di pejabat tanah sebanyak dua kali di bawah sub-ss. (1), (2) dan (3) s. 265 KTN.

Diputuskan (membenarkan rayuan dengan kos)

Oleh Mohd Hishamudin Yunus HMR menyampaikan penghakiman mahkamah:

(1) Sekiranya sub-s. (3A) dibaca berasingan daripada sub-ss. (2) dan (3), seperti yang diputuskan oleh Mahkamah Tinggi, apakah penjelasan bagi perkataan-perkataan 'rujuk hal perkara ke mahkamah' dalam sub-s. (3) kini. Perkataan-perkataan tersebut hanya masuk akal sekiranya dibaca bersama-sama dengan sub-s. (3A). Dengan memasukkan sub-s. (3A), kedudukan tidak berubah kerana mesti terdapat dua kegagalan jualan oleh Pentadbir Tanah sebelum beliau boleh merujuk hal perkara tersebut kepada Mahkamah Tinggi. Apa yang diperjelaskan oleh pindaan ini, melalui proviso sub-s. (3A), adalah bahawa Mahkamah Tinggi tidak boleh, dalam menjalankan kuasanya di bawah sub-s. (3A) dalam menangani rujukan tersebut, mengeluarkan perintah untuk memerintahkan Pentadbir Tanah menjalankan jualan. Di bawah pra-pindaan peruntukan sub-s. (3), tidak dinyatakan dengan jelas sama ada Mahkamah Tinggi, dalam menangani rujukan, mempunyai kuasa untuk mengeluarkan perintah untuk memerintahkan Pentadbir Tanah menjalankan jualan.

(2) Klausa 30 Kenyataan Penerangan Rang Undang-undang tidak membantu dalam pembentukan sama ada sub-s. (3) terpinda atau sub-s. (3A) yang baharu. Ia tidak mengandungi penerangan penuh dan jelas mengenai pindaan-pindaan ke atas s. 265. Klausa tersebut hanya sekadar langkah berbentuk kenyataan lisan untuk menerangkan tujuan-tujuan pindaan; kebergunaan sedikit dan ketara sekali, kl. 30 tidak menyebut tentang, antara lain, proviso kepada sub-s. (3A).

(3) Perintah Mahkamah Tinggi dan keputusan Pentadbir Tanah untuk merujuk hal perkara tersebut kepada Mahkamah Tinggi diketepikan. Hal perkara tersebut diperintahkan dikembalikan kepada Pentadbir Tanah untuk menjalankan inkuiri teratur selaras dengan peruntukan-peruntukan s. 261 KTN dan membuat keputusan yang sewajarnya di bawah s. 263 Kanun yang sama.

Legislation referred to:

National Land Code, ss. 260, 261, 263, 265(1), (2), (3), (3A)
National Land Code (Amendment) Act 2001, s. 30

For the appellant - Hardeep Singh Jessy; M/s Hardeep Gurvin & Co
For the respondent - Ramsun Ho Chii Huey; M/s See Ramsun & Tan

[Appeal from High Court, Pulau Pinang; Originating Summons No: 24-393-03-2012]

Reported by Najib Tamby

JUDGMENT

Mohd Hishamudin Yunus JCA:

Introduction

[1] This appeal concerns a question of law: Whether a Land Administrator has the power pursuant to sub-s. (3A) of s. 265 of the National Land Code ('the NLC') to refer an application for sale, made to the Land Administrator pursuant to s. 260 of the NLC, to the High Court, without previously having carried out a sale of the subject land at the land office twice pursuant to sub-ss. (1), (2) and (3) of s. 265 of the National Land Code.

[2] Section 265 states:

> Procedure at sale
>
> 265. (1) Where a sale is held pursuant to an order under section 263:
>
> (a) the sale shall take place under the direction of the Land Administrator, who may take the assistance thereat of any licensed auctioneer; and
>
> (b) the chargee shall be entitled to bid at the sale.
>
> (2) If at the sale no bid is received at or above the reserve price, the land or lease in question shall be withdrawn from the sale, and the Land Administrator shall direct that it be put up for auction on a subsequent date, either at the same or at a new reserve price, and shall give such notice of the subsequent sale as he may consider appropriate.
>
> (3) If at the subsequent sale no bid is received at or above the reserve price, the Land Administrator may:
>
> (a) direct that it be put up for auction at a subsequent date, either at the same or a new reserve price and shall give such notice of the subsequent sale as he may consider appropriate; or
>
> (b) withdraw it from the sale and refer the matter to the Court.
>
> (3A) The Court may substitute for the order of the Land Administrator an order for sale under section 256 or make such other order as it may think just:
>
> Provided that the Court shall not make any order to the Land Administrator to carry out the sale.
>
> (4) The purchaser at any such sale shall, upon payment to the Land Administrator of the full amount of the purchase price, be entitled to receive from him:
>
> (a) a certificate in Form 16I that the land or lease in question has been sold to him under the authority of this Act (which certificate shall, as provided by section 267, be registrable by the purchaser as if it were an instrument of dealing); and

A (b) if deposited with the Land Administrator pursuant to paragraph 264(2)(b), the issue document of title to the land or, as the case may be, duplicate lease.

(4A) Notwithstanding subsection (4), where the chargee is a financial institution, the purchaser at the sale shall, upon payment of the full B amount of the purchase price to the chargee and upon receipt of the certification in writing from the chargee not later than fourteen days following the payment of such sum, that the balance or the full amount of the purchase price has been paid, shall be entitled to receive from the Land Administrator:

C (a) a certificate in Form 16I that the land or lease in question has been sold to him under the authority of this Act (which certificate shall, as provided by section 267, be registrable by the purchaser as if it were an instrument of dealing); and

(b) if deposited with the Land Administrator pursuant to paragraph 264(2)(b), the issue document of title to the land or, as the case may D be, duplicate lease.

(5) Where the order for sale under subsection 263(2) requires the payment of any deposit by the successful bidder in any public auction and the balance to be settled on a date not later than one hundred and twenty days from the date of the sale, the provisions of section 267A shall apply.

E

The Facts Of The Case

[3] The appellant was the registered proprietor of the subject land. The subject land was charged to the respondent bank on 17 February 1996 as security for a loan taken by a third party. The third party defaulted on the F loan. As the subject land was held under a land office title, the respondent on 28 March 2006 proceeded to apply to the Land Administrator for the sale of the land pursuant to s. 260 of the NLC.

[4] It is not disputed that an inquiry was held before the Land Administrator on various dates (the last date being 20 December 2011), but G the Land Administrator did not make any order for sale in respect of the subject land pursuant to s. 263 of the NLC. Instead, purporting to act under s. 265(3A) of the NLC, the Land Administrator 'referred' the application to the High Court.

[5] In the case before us the Land Administrator purported to refer the H application to the High Court *via* his letter dated 2 January 2012 because (according to para. 3 of the letter) the appellant/chargor had disagreed with the reserved price as proposed by the respondent/chargee, and had applied that the matter be referred to the High Court.

[6] The High Court purporting to act under s. 265(3A) made an order for I sale.

The Appellant's Submission

[7] Before us the appellant submitted that, since there were no two unsuccessful auctions before the Land Administrator carried out pursuant to sub-ss. (1), (2) and (3) of s. 265 of the NLC, the Land Administrator had no power under sub-s. (3A) of s. 265 to refer the application to the High Court. Since the purported reference to the High Court was an invalid reference, a nullity, it follows then that the High Court had no power to make the order for sale; and that the purported order for sale by the High Court was a nullity.

The Respondent's Submission

[8] The respondent, on the other hand, takes the position that sub-s. (3A) of s. 265 was inserted *via* an amendment to s. 265 and the purpose of this amendment is to confer power to the Land Administrator to refer any application for sale to the High Court regardless of whether or not there had been prior unsuccessful sale (or sales) before the Land Administrator. In support of its argument, the learned counsel for the respondent refers to para. 30 of the Explanatory Statement to the National Land Code (Amendment) Bill 2000 which states:

> 30. Clause 30 seeks to amend section 265 of the Code to enable the Land Administrator, at the subsequent sale, to specify a new reserve price, to provide that the matter be referred to the Court, to enable the chargee to receive the purchase price of the sale by public auction of land held under Land Office title and to provide that the chargee shall certify in writing that the full purchase price has been paid before issuing the Certificate of Sale to the purchaser.

Decision Of The High Court

[9] The learned High Court Judge takes the view that sub-s. (3A) of s. 265 must be read independently of sub-ss. (2) and (3) of the same; and that this must be the intention of Parliament when it amended s. 265 *via* the National Land Code (Amendment) Act 2001 (Act A1104) that came into force on 1 December 2001 by deleting sub-s. (3)(c) of that section and introduced sub-s. (3A).

[10] The learned High Court Judge said in his judgment:

> Having perused and considered both the pre-amended and post-amended section 265 NLC particularly sub-sections (3) of the pre-amended provision and the present sub-section (3) and (3A), I am of the view that the intention of the legislature to remove the power of the Court from the old sub-section (3) and reintroduced as new provision (3A) with slight variations as submitted by the plaintiff above, is to give the Court the power to make an order for sale under section 256 which may substitute for the order as it may think just except shall not order the Land Administrator to carry out the sale. I agree with the submission by learned counsel for the plaintiff that subsection (3A) being inserted as a new provision is therefore not subject to the provisions of sub-sections (2) and

(3). I say so because the old sub-section (3) which contained paragraphs (3)(a), (b) and (c) are conjunctive when "and" is used after paragraphs (3)(b) and before paragraph (3)(c) which the new sub-section (3)(a) or (b) is disjunctive using "or" while new (3A) is inserted after removing it from the old (3)(c). It appears to me the clear intention of the legislature is the new sub-section (3A) is not a continuation of the process in sub-section (3)(a) or (b). Otherwise, the amendment would appear superfluous. Be that as it may, even by reading subsection (3) and (2A) proviso together, the 2 provisions are not repulsive but synchronize with one another. Sub-section (3) provides the Land Administrator with the 2 options of action i.e. if at the subsequent sale no bid is received at or above the reserve price, the Land Administrator may (a) direct auction at a subsequent date *inter alia* or (b) withdraw the sale and refer the matter to the Court. The proviso to sub-section (3A) stated that the Court shall not make any order to the Land Administrator to carry out sale. I find this to be distinctive so as not to infringe the discretion given to the Land Administrator under sub-section (3) to section 265 of the NLC. If sub-section (3A) is subject to sub-sections (2) and (3), there is no meaning in sub-section (3A) for the Court to substitute for the order of the Land Administrator as in (3)(a) where he may direct a subsequent auction, for another order for sale and as in (3)(b) where the Land Administrator may withdraw the sale and refer the matter to Court and by the proviso in sub-section (3A), the Court shall not order the Land Administrator to carry out the sale. I agree with the submission by learned counsel for the plaintiff that section 265(3A) NLC gives the Court the power to make an order for sale in the event the Land Administrator is unable to do so such as in the instant case where the reserve price could not be determined by the Land Administrator after inquires.

The Appeal

[11] Dissatisfied with the decision of the High Court, the appellant/defendant appealed to the Court of Appeal.

Subsection (3) Of s. 265 Of The NLC Prior To The Amendment

[12] Prior to the amendment of sub-s. (3) of s. 265, the subsection reads:

> (3) If at the subsequent sale no bid is received at or above the reserve price:
>
> (a) the land or lease shall be withdrawn from the sale; and
>
> (b) the Land Administrator shall refer the matter to the Court;
>
> (c) the Court may substitute for the Order of the Land Administrator an order for sale under section 256, or make such other order as it may think just.

Our Decision

[13] On 26 May 2014 we allowed the appellant's/defendant's appeal with costs. We set aside the order of the High Court as well as the decision of the Land Administrator to refer the matter to the High Court. We order that the

matter be sent back to the Land Administrator to carry out a proper inquiry in accordance with the provisions of s. 261 of the NLC and to make the appropriate decision under s. 263 of the same.

Our Reasons

[14] With respect, we are unable to agree with the interpretation as adopted by the learned High Court Judge that sub-s. (3A) of s. 265 should be read independently of sub-ss. (2) and (3) of the same; and that the High Court has the power to make an order for sale under sub-s. (3A), provided there was a reference to the High Court by the Land Administrator, even where there had been no two previous unsuccessful sales (in the sense of there being no bidders). If sub-s. (3A) were to be read independently of sub-ss. (2) and (3), as ruled by the learned High Court Judge, then how does one explain the meaning of the words: "refer the matter to the Court" in the present sub-s. (3)? These words will only make sense if we were to read them together with sub-s. (3A). We are of the view that it is clear that, with the introduction of sub-s. (3A), the position does not change: there still must have been two prior unsuccessful sales by the Land Administrator before he can lawfully refer the matter to the High Court. What the amendment now makes clear – and this is *via* a proviso to sub-s. (3A) – is that the High Court cannot, in exercising its power under sub-s. (3A), that is to say, in dealing with the reference, make an order to direct the Land Administrator to carry out a sale. Under the pre-amended provision of sub-s. (3), it is not made clear as to whether or not the High Court, in dealing with the reference, had the power to make an order directing the Land Administrator to carry out the sale.

[15] We find that cl. 30 of the Explanatory Statement to the Bill, as referred to by the learned counsel for the respondent, is of no assistance to the construction of either the amended sub-s. (3) or the new sub-s. (3A). It does not contain a full and clear explanation as to the purpose of the amendments to s. 265, and this is unfortunate. With respect to the Parliamentary draftsman, we view the clause as a mere lip service effort to explain the purposes of the amendments; of little utility; and, significantly, cl. 30 had omitted to even mention (let alone to explain the purpose of), among others, the proviso to sub-s. (3A).

Appeal allowed with costs; order of High Court set aside; matter sent back to the Land Administrator to hold an inquiry in accordance with the NLC.